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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RODNEY STEVEN BIGGS,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a corporation,
Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is it error to use a state court rule to direct a verdict in a Federal Employers' Liability Act case?

Is it error to limit recovery in assault Federal Employers' Liability Act cases only to those in which the plaintiff can show the prior vicious propensities of the assailant and ignore normal negligence principles?

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OPINIONS BELOW

Biggs v. *Terminal R.R. Ass'n of St. Louis,* 110 Ill.App.3d 709, 442 N.E.2d 1353 (1982)

Denial of Petition For Leave To Appeal In The Supreme Court Of Illinois, 93 Ill.2d 21 (1983)

JURISDICTIONAL STATEMENT

The date of the judgment or decree sought to be reviewed is February 1, 1983. The time of its entry is 2:00 p.m. Central Time.

The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C.A. Sec. 1257(3).

STATUTE INVOLVED

The case involves the Federal Employers' Liability Act 45 U.S.C. Sec. 51.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASE

This case arises out of an injury which plaintiff, Rodney Biggs, sustained when he was stabbed in the back of the head with a railroad spi e by a fellow employee, Bob Parr, on April 17, 1979. Plaintiff filed this suit under the Federal Employers' Liability Act (FELA), 45 U.S.C. Sec. 51 et.seq., against defendant on May 1, 1979.

On April 2, 1979, plaintiff Rodney Biggs hired on at the TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS as a track laborer. (R.30) A track laborer replaces railroad ties and track. (R.30-31) Plaintiff had met Bob Parr, a fellow worker, before but he did not know him well. (R.31)

The day before the plaintiff was injured, that is April 16, 1979, Bob Parr took the plaintiff home from work.

The plaintiff did not have any problems with Parr earlier that day before Parr took the plaintiff home. (R.31-32) On the way home they did not argue about anything. (R.32)

On April 17, 1979, the day of the incident, the plaintiff reported to work at about 7:00 a.m. Plaintiff reported to the shanty in the railroad yards. Plaintiff told Parr about a dream he had had about Parr pouring Cherrios in the heating and air conditioning ducts of the plaintiff's trailer. This had not happened. No portion of the dream was based on any fact. (R.32)

When the plaintiff told this story there were about twelve people present in the shanty including Bob Parr. (R.32-33) A couple of the men laughed it off. About that time Ron Gartner, a track foreman, came in and said to the men that it was time to go to work that they should come on and get their tools.

The plaintiff and the other men including Parr walked down to the tool shed to get the tools. (R.33)

On the way to the tool shed Ron Gartner, the track foreman, heard the plaintiff and Bob Parr bickering. (R.172)

In the tool shed Parr asked the plaintiff to repeat the dream. Plaintiff repeated the dream to Ron Gartner, the track foreman. (R.34) After plaintiff repeated the dream Bob Parr asked Ron Gartner for permission to beat the plaintiff up. To which Ron Gartner said, "Wait a minute. Let me get out of here." Then Ron Gartner took off for the door. (R.38)

Roy Muir, the assistant foreman, also said, "Wait a minute, let me get out of here too." Then Roy Muir left. After both the track foreman and the assistant foreman left, Bob Parr struck the plaintiff in the jaw with his fist. (R.39)

Plaintiff then left the tool shed and went out to the track. Plaintiff went over and picked up a spike puller and started pulling spikes.

Plaintiff asked Bob Parr in front of Ron Gartner why Parr hit plaintiff. Parr said that he hated the plaintiff and started grabbing at the plaintiff and coming towards him. The plaintiff backed up and got behind Gartner.

Gartner was not doing anything to stop this. Gartner did not do anything. (R.40)

As Parr continued to try to grab the plaintiff, plaintiff pulled up a spike and swung at Parr's hands and accidently grazed Parr's lip.

Parr reached down and picked up a pick ax and hollered that he was going to kill the plaintiff. Gartner did not do anything or say anything to Parr about stopping what he was doing. (R.41)

Parr on his own threw the pick ax down.

Plaintiff turned around to wipe his head as if to show that he was relieved and the plaintiff felt a sharp blow in the back of his head. (R.42)

During the time that the plaintiff was in the tool shed Ron Gartner did not do anything to protect the plaintiff from Bob

Parr. Ron Gartner never threatened to fire Parr that morning if he got involved in hurting somebody. In fact, the plaintiff testified that Gartner encouraged it. (R.50)

Ron Gartner was a track foreman on April 17, 1979, the day of the incident. As a foreman he was in charge of the men under him. One of the employees he was in charge of was the plaintiff. He was also in charge of Bob Parr. As a foreman and as their supervisor it wsa his duty to protect them from any injury. (R.66)

Gartner was in the tool shed when he heard Parr say something about beating the plaintiff up and then Gartner left. At the trial Gartner was impeached when he tried to deny that he heard Parr say, "Can I hit him?" (R.67-68)

When they left the tool shed and were out near the tracks, Gartner admitted that Bob Parr picked up a pick and he was going to go after the plaintiff. At that point the plaintiff had nothing in his hands. (R.69)

Gartner admitted that he did not seek the assistance of Roy Muir, the assistant foreman, at all in breaking up what was going on between these two men. Gartner admitted that at any time up until the time when the plaintiff was hit with the spike did he ever request any of the men to help him keep these two men apart or stop something from happening. Gartner saw Parr strike the plaintiff with the pointed end of the spike. Gartner admitted that he had heard the plaintiff tell Parr that the plaintiff would not fight Parr because Parr was twice the plaintiff's size. (R.70)

Gartner admitted that in the tool shed after Parr threatened the plaintiff that Gartner did not say anything about them being fired if there was any fighting. (R.76)

Gartner admitted that he never asked for any assistance. (R.77)

Gartner later on in his testimony was asked whether he had a duty to protect the employees under his supervision. When he denied that he did, he was impeached again with prior deposition testimony. (R.171)

Gartner testified that he was first aware that there was a problem between the two men in the tool shed when Parr said something to him about whipping the plaintiff. (R.171) Gartner admitted that he knew there was bickering going on before the men even got to the tool shed. (R.172)

Gartner admitted that he was in the tool shed when Parr asked Gartner if he could whip the plaintiff. (R.172) Gartner also admitted that he knew Parr was going to hit the plaintiff with the pick. Gartner also admitted that although he had seen fights before he had never seen one where somebody got stabbed while their back was turned. (R.174)

The jury returned a verdict in the amount of Seventy Three Thousand Eight Hundred Dollars ($73,800.00) for the plaintiff. The trial court denied the defendant's Post-Trial Motion. The Appellate Court of Illinois, Fifth District, reversed the verdict of the jury, effectively directing a verdict for the defendant.

Review of the judgment of a state court is sought. The stage in the proceedings at which the federal questions sought to be reviewed were raised was in the Appellate Court of Illinois, Fifth District. The Appellate Court of Illinois, Fifth District, on page 711 of 110 Ill.App.3d 709 (1982) cited the Illinois state court rule called the *Pedrick* rule for directing a verdict and improperly applied it to this F.E.L.A. case. Also the Appellate Court of Illinois, Fifth District, on page 712 of 110 Ill.App.3d 709 (1982) announced incorrectly its rule that "before the railroad may be found negligent, it must have had prior notice of the assailant-employee's violent propensities." The opinion implied that the prior notice could not be the same day. 110 Ill.App.3d 709 at page 713. The first time that these federal questions could be properly raised so as to give this Court

jurisdiction to review the judgment on writ of certiorari was in the PETITION FOR LEAVE TO APPEAL IN THE SUPREME COURT OF ILLINOIS. They were timely, properly, and directly raised on page 2 and throughout the Petition. With regard to the way in which they were passed on by the Court, the Illinois Supreme Court denied the petition for leave to appeal. 93 Ill.2d 21 This was after the Appellate Court of Illinois, Fifth District, had erroneously ruled on both issues in such a way as to direct a verdict against the plaintiff in an F.E.L.A. case. This was after the Court of first instance had denied a motion for directed verdict and the jury had returned a verdict for the plaintiff. (R.158) (R.242)

REASONS FOR GRANTING THE WRIT

I

It Is Error To Use A State Court Rule To Direct A Verdict In A Federal Employers' Liability Act Case.

The Illinois state courts have decided a federal question in a way in conflict with applicable decisions of this Court.

The federal question is whether or not a court should direct a verdict in a Federal Employers' Liability Act case. According to *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 64 S.Ct. 232 (1943) the foregoing is a federal question. 64 S.Ct. at page 234.

The Illinois state rule for directing a verdict is the one announced in *Pedrick* v. *Peoria & Eastern R.R. Co.* (1967), 37 Ill.2d 494, 229 N.E.2d 504, a railroad crossing case, not an F.E.L.A. case.

The Appellate Court of Illinois, Fifth District, used the *Pedrick* rule to reverse the jury verdict in this case and in essence direct a verdict. The *Pedrick* rule is the wrong rule. In an F.E.L.A. case the U.S. Supreme Court held in Brady v. Southern Ry. Co., 320 U.S. 476, 64 S.Ct. 232 (1943) that a federal rule should be used to decide whether to direct a verdict.

According to the Appellate Court of Illinois, Fifth District: "Defendant's appeal from the denial of its motion for directed verdict requires us to view all of the evidence in the light most favorable to plaintiff. Only if the evidence overwhelmingly favors defendant may this Court reverse the jury verdict for plaintiff. Pedrick v. Peoria & Eastern R.R. Co. (1967), 37 Ill.2d 494, 229 N.E.2d 504." 110 Ill.App.3rd at page 711.

The *Pedrick* rule for directing a verdict is the Illinois state court rule. The U.S. Supreme Court in *Brady* held that a federal rule should be applied. The Court said at 64 S.Ct. page 234: "In Employers' Liability cases, this question must be determined by

this Court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states. Citations omitted. It is true that this Court has held that a state need not provide in F.E.L.A. cases any trial by jury according to the requirements of the Seventh Amendment. Citations omitted. But when a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question. The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact - in this case, the jury. (Citations omitted.) When the evidence is such that *without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict,* the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict." (Emphasis supplied.)

Hence, *Brady* holds that a federal rule for directed verdicts applies in F.E.L.A. cases heard in state courts. The Appellate Court of Illinois, Fifth District, did not apply the federal rule.

The significance of applying the wrong rule is that the Appellate Court of Illinois, Fifth District, weighed the credibility of the witnesses on the critical issue of notice. *Brady* holds that the court is not to weigh the credibility of the witnesses.

In this case the critical issue was whether the railroad through its foreman had sufficient notice so that the danger to the plaintiff from intentional misconduct was foreseeable.

In support of this issue the plaintiff presented the following facts:

1. The foreman Ron Gartner admitted to hearing Bob Parr, the assailant, and Rodney Biggs, the plaintiff, bickering between the reporting place (shanty) and the tool shed. (R.172)

2. The foreman admitted that Parr asked him in the tool shed if he could beat up Biggs. (R.67-68)

3. Biggs testified that Gartner encouraged the assault in the tool shed when the foreman asked to let him get out of there first. The assistant foreman Roy Muir did the same thing. (R.38) (R.39)

4. Out at the track Biggs asked Parr in front of Gartner why he punched him in the tool shed. (R.40)

5. With Gartner between Biggs and Parr, Parr began grabbing for Biggs. (R.40)

6. Parr picked up a pick ax and threatened Biggs with it with Gartner right there. (R.41) (R.69)

7. While Gartner was there and Biggs' back was turned Parr picked up a railroad spike and stabbed Biggs in the back of the head. (R.42) (R.70)

8. Gartner admitted he knew there was a problem between the two men when he heard them bickering before they got to the tool shed and when Parr threatened Biggs in the tool shed. (R.172) (R.171)

Without weighing the credibility of the testimony which produced the foregoing facts there is sufficient evidence to show that the railroad through its foreman Gartner had reasonable notice to do something to protect the plaintiff. More importantly, under the *Brady* rule one cannot fairly say in the face of this evidence that the "one reasonable conclusion" is that there was no reasonable notice.

Nevertheless, the Appellate Court of Illinois, Fifth District, opinion indicates that the Court did weigh the credibility of the witnesses. In spite of the foregoing testimony the Court concluded that Ron Gartner did not see anything in the tool shed. It ignored the bickering which went on even before the tool shed. The Court ignored Parr's threat to the plaintiff in the tool shed while Gartner was there. It ignored Gartner's encouragement of violence by saying he wanted to get out of there first.

The Appellate Court of Illinois, Fifth District, also weighed the testimony between Biggs and Gartner as to what happened at the tracks before the stabbing and chose to believe Gartner that he did not see any of the events leading up to the stabbing. This is in spite Biggs' testimony that he asked Parr in front of Gartner why Parr hit the plaintiff in the tool shed. (R.40) This is in spite of Biggs' testimony that Gartner was between Biggs and Parr when Parr was grabbing for Biggs. (R.40) This is in spite of Gartner's admitting that he saw Parr pick up the pick ax and threaten Biggs with it. (R.69)

Because the Appellate Court of Illinois, Fifth District, weighed the credibility of the witnesses in violation of the *Brady* rule and believed some of the testimony of the foreman Gartner while ignoring other parts of Gartner's testimony and the plaintiff's testimony, the Appellate Court of Illinois, Fifth District, overlooked those facts which show that the railroad had notice. Without repeating them in detail, events took place between the shanty and the tool shed, in the tool shed, and at the tracks which should have been notice to Gartner that someone could get hurt.

By reversing the verdict of the jury and in essence directing a verdict, the Appellate Court of Illinois, Fifth District, has done something which Congress did not intend in passing the F.E.L.A.

In *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957) the U.S. Supreme Court made it clear that F.E.L.A. cases in most instances should be decided by the jury.

"The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." 77 S.Ct. at 450, 451.

In conclusion, the Appellate Court of Illinois, Fifth District, applied the wrong rule for a directed verdict. It failed to apply the *Brady* rule which is the federal rule and erroneously applied the *Pedrick* rule which is the state rule. The Court erroneously weighed the credibility of the witnesses which *Brady* says not to do. If all the testimony were taken at face value there was sufficient notice to the railroad through the foreman so that it cannot fairly be said that the "one reasonable conclusion" is that the railroad had no notice.

By denying Rodney Biggs' Petition for Leave to Appeal the Supreme Court of Illinois let stand the decision of the Appellate Court of Illinois, Fifth District. Hence, the Illinois state courts have decided a federal quetsion — whether or not to direct a verdict in an F.E.L.A. case — in a way in conflict with applicable decisions of this Court. *Brady* tells the rule to use. The Illinois courts used a different one. If the right rule had been properly applied the verdict of the jury would have been upheld.

II

It Is Error To Limit Recovery In Assault Federal Employers' Liability Act Cases Only To Those In Which The Plaintiff Can Show The Prior Vicious Propensities Of The Assault And Ignore Normal Negligence Principles.

The Illinois courts decided another federal question in a way in conflict with applicable decisions of this Court. This other federal quetsion is the meaning of negligence in assault cases under the F.E.L.A. The Illinois state courts decided in this case that before the railroad may be found negligent, it must have

had prior notice of the assailant-employee's violent propensities. It suggested that prior notice meant before the morning of the incident. This Court has announced no such rigid rule for the determination of negligence. This Court has held that a railroad has a duty to make reasonable provision against foreseeable danger from intentional or criminal misconduct.

The critical fact which makes this assault case different from many others is that beside the assailant and the victim there was a third person present - the foreman Gartner.

Ignoring Gartner's presence the Appellate Court of Illinois, Fifth District, announced the rule of negligence which it applied to this case as follows: "The reported cases establish that before the railroad may be found negligent, it must have had prior notice of the assailant-employee's violent propensities." 110 Ill.App.3d at page 712.

The suggestion is that the foregoing rule applies in all assault cases. The Court does not say which "reported cases" it was relying on. Nevertheless, in the ones it cites, mainly *Harrison* v. *Missouri Pac. R.Co.*, 83 S.Ct. 690, 372 U.S. 248, 9 L.Ed. 2d 711 (Ill. 1963), the facts of the case suggest that the only persons present were the assailant and the victim. The only way the railroad could have protected the victim would have been to predict the assailant's conduct based on prior violent propensities. There was no railroad supervisor present to do anything.

The F.E.L.A. does not by its language apply one rule to assault cases. The Federal Employers' Liability Act 45 U.S.C.A. Sec. 51 makes the railroad liable for "injury or death resulting in whole or in part from the *negligence* of any of the officers, agents, or employees of such carrier. . ." (Emphasis supplied.) It simply requires that negligence be proved.

The inquiry then becomes whether the railroad was negligent. In any negligence case the first two questions are whether there is a duty and whether there is a breach of that duty.

The U.S. Supreme Court in *Harrison* v. *Missouri Pac. R.Co.*, 83 S.Ct. 690, 372 U.S. 248, 9 L.ED. 2d 711 (Ill. 1963) and in *Lillie* v. *Thompson*, 332 U.S. 459, 68 S.Ct. 140 (1947), held that the railroad has a duty to make reasonable provision against foreseeable danger from intentional or criminal misconduct. The Court did not confine this duty to the facts of *Harrison* or *Lillie*. In fact, the situations were different in each case. The Court found that there were sufficient facts to find foreseeability in each case.

These Supreme Court cases then create a duty to make reasonable provisions if the danger is foreseeable.

Further, the foreman Gartner admitted it was his duty to protect his men from injury. (R.66) (R.171)

Finally, the duty is also discussed in Restatement, Second, Torts.

"Sec. 302B. Risk of Intentional or Criminal Conduct

An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other to a third person which is intended to cause harm, even though such conduct is criminal.

. . .

B. Where the actor stands in such a relation to the other that he is under a duty to protect him against such misconduct. Among such relations are those of carrier and passenger, innkeeper and guest, *employer and employee*, possessor of land and invitee, and bailee and bailor. (Emphasis supplied.)

Illustrations:

4. The A company operates a hotel, in which B is a guest. C, another guest, approaches B in the hotel lobby, threatening to knock him down. There are a number of

> hotel employees on the spot, but, although B appeals to them for protection, they do nothing and C knocks B down. The A Company may be found to be negligent toward B."

From the foregoing it is clear that the railroad did have a duty to protect Biggs. The illustration in the Restatement is anologous to this situation. At the tracks Biggs appealed to Gartner for protection and Gartner did nothing.

The next question is whether there was evidence to support the conclusion that the railroad breached its duty to Biggs to make reasonable provisions against foreseeable danger from intentional misconduct.

The facts and supporting references in the record which were listed in part I of this section show that the assault was foreseeable. The foreman was present. He watched the situation develop and he could have protected the plaintiff but he did not do so.

The plaintiff testified that Gartner did not do anything to stop the attacks. (R.40) Gartner admitted that he never asked for any assistance from his assistant foreman or the other men in breaking up what was going on between these two men. (R.70) (R.77)

The foreman's failure to make reasonable provisions in the face of the ongoing bickering, threats and attacks on the plaintiff was negligence on the part of the railroad through its foreman. There was certainly enough evidence of negligence so that a verdict should not have been directed.

The Appellate Court of Illinois, Fifth District, seems to be saying that one employee can bicker with another; one employee can threaten another; one employee can punch another; one employee can grab at another; one employee can pick up a weapon and threaten to kill another; and one employee can stab another all in the presence of a foreman and

the foreman has no duty to do anything about it unless the assailant-employee is known to have violent propensities. That clearly in not the law. It would mean that a railroad has special immunities from the ordinary rules of negligence.

The Appellate Court of Illinois, Fifth District, erroneously applied a rule which is used in the case of two isolated employees to a case in which there was a supervisor present. When there is a supervisor present to intervene it is not as important for the employer to have prior notice of the assailant-employee's violent propensities. Here the railroad through its foreman had direct chances to protect the plaintiff. It did not have to predict violent behavior from previous violent propensities.

The Appellate Court of Illinois, Fifth District, applied the wrong rule to this situation.

Other than the illustration from the Restatement an analogous factual situation to this one could not be found. The *Harrison* case involved two employees by themselves. In order to prevent an assault in such a case the railroad would have to have prior notice of vicious propensities. In this case the two employees were joined by a railroad foreman who watched the situation develop and even encouraged it according to Rodney Biggs' evidence. He could have protected the plaintiff without prior notice of violent propensities. He had direct opportunity.

If *Harrison* does not apply to this case because of the presence of the foreman, the Illinois state courts have decided an important question of federal law which has not been, but should be, settled by this Court.

Based on the foregoing facts and authorities, this Court should settle the question in favor of Rodney Biggs.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 81-224

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

Rodney Steven Biggs,
Plaintiff-Appellee,
v.
Terminal Railroad Association of St. Louis, a corporation,
Defendant-Appellant.

Appeal from the Circuit Court of Madison County
Honorable Charles W. Chapman, Judge Presiding

MR. PRESIDING JUSTICE KARNS delivered the opinion of the court:

Rodney Steven Biggs brought this action under the Federal Employers' Liability Act (45 U.S.C. §51 et. seq. (1976)) to recover damages for personal injuries sustained while employed as a track laborer for defendant, Terminal Railroad Association of St. Louis. Defendant appeals from the judgment entered in the circuit court of Madison County on a jury verdict in plaintiff's favor.

On appeal, defendant argues that there can be no recovery under the Federal Employers' Liability Act because plaintiff was not acting within the scope of his employment when he sustained injury and there was no evidence that defendant was negligent in hiring or retaining in its employment a vicious, ill-tempered employee.

The testimony established that plaintiff and co-employee, Robert Parr, were track laborers and had been working for defendant 15 days on April 17, 1979. On that morning, plaintiff, Parr and 10 to 12 other employees reported for work at a shanty at the railroad yards. While in the shanty, plaintiff related to the men a dream he had the night before about Parr pouring "Cheerios" in the heating and air conditioning ducts of plaintiff's trailer. Plaintiff testified that some of the men laughed but that there was no other reaction to the story. At that time, Ron Gartner, the track foreman, told the men to get their tools and get to work. Plaintiff and Parr then walked to the tool shed. Plaintiff repeated the dream in the tool shed to Gartner at which time Parr asked Gartner if he (Parr) could beat-up plaintiff. Plaintiff further testified that Gartner responded by saying he wanted to get out of the shed first. Gartner testified he responded by telling Parr and plaintiff to get to work. Gartner then left the shed. Plaintiff then testified that Parr hit him on the jaw. Subsequently, plaintiff went outside and began pulling spikes at the track. When Parr came out plaintiff said, in Gartner's presence, "how come you hit me?" Parr then began grabbing at plaintiff and plaintiff reacted by striking Parr with a railroad spike he had in his hand. The spike cut Parr's lip. Parr picked up a pick axe and threatened plaintiff but threw the axe down without striking plaintiff. Plaintiff testified he turned away, believing Parr was now in control of himself. At that point, plaintiff was struck on the head with a railroad spike by Parr.

Gartner testified that he saw nothing occur between plaintiff and Parr in the tool shed and that he was turned away from plaintiff and Parr outside at the track until after Parr's lip was cut. When Parr picked up the axe, Gartner told him to drop it and get to work. When Parr did so, Gartner testified that he then turned back to his work having no reason to suspect further trouble.

Defendant's appeal from the denial of its motion for directed verdict requires us to view all of the evidence in the light most

favorable to plaintiff. Only if the evidence overwhelmingly favors defendant may this court reverse the jury verdict for plaintiff. *Pedrick* v. *Peoria & Eastern R.R. Co.* (1967), 37 Ill.2d 494, 229 N.E.2d 504.

The FELA makes a railroad liable for injury or death resulting in whole or part from the negligence of any of its employees, officers or agents. In order to recover under the FELA, plaintiff must prove he was acting within the scope of his employment, that defendant was negligent and that the negligence contributed in whole or part to plaintiff's injury.

The testimony, although brief on this point, is sufficient to establish that plaintiff was acting within the scope of his employment at the time of the injury. Plaintiff was injured during working hours and he was injured while on the railroad's premises. After Parr struck plaintiff in the tool shed, plaintiff went out to the track and began pulling spikes. His injury occurred moments later. Although plaintiff did strike Parr, the jury could find that he did so only after provocation by Parr. We reject defendant's first contention that plaintiff was engaged in a fight with Parr and, therefore, was acting outside the scope of his employment.

The principles of law in these cases are well established. A railroad, as any employer, may be held liable under the Act where the assault by the fellow employee may be said to be within the scope of his employment, but the employee acts negligently. Liability may also be predicated upon the direct negligence of the railroad in knowingly employing, or retaining in its employ, a person with a quarrelsome disposition and vicious propensities who might reasonably be said to be a threat to other employees while performing their jobs within the scope of their employment. (Restatement (Second) of Agency §213 (1957).) These theories of liability were discussed at length in *Tatham* v. *Wabash R.R. Co.* (1952), 412 Ill. 568, 107 N.E.2d 735 and have been the subject of two annotations in American Law Reports (Annots., 33 A.L.R.2d 1295 (1959), 8 A.L.R.3d 442, (1966).

Initially, we note that plaintiff makes no claim that defendant is vicariously liable under the principles of *respondeat superior,* that is, negligent because Parr acted negligently while acting within the scope of his employment. Instead, plaintiff's claim is one of direct negligence.

Plaintiff alleged three separate acts of negligence: failure to protect plaintiff from Parr, failure to provide plaintiff with a reasonably safe place to work and retention of Parr in its employ although it knew or should have known Parr was an ill-tempered and vicious person.

The reported cases establish that before the railroad may be found negligent, it must have had prior notice of the assailant-employee's violent propensities. Without any notice, defendant could not be negligent by retaining Parr in its employ. And, it could not be negligent by failing to protect plaintiff or by failing to provide plaintiff with a safe place to work if it did not know of Parr's violent nature and thus could not foresee any harm to plaintiff.

Because we find defndant did not have sufficient notice, we hold that defendant was not negligent and under the rule of *Pedrick,* the judgment in plaintiff's favor must be reversed.

It was not alleged, nor was there any evidence, that defendant was negligent in employing an employee with known vicious propensities. There was no evidence that Parr had ever been quarrelsome or a person of violent disposition. The only evidence of this kind was the attack on plaintiff and if defendant was negligent in retaining Parr in its employ, the only evidence of prior notice of Parr's vicious disposition was that brought to the attention of Gartner, the track foreman, on the morning of the incident.

A corporate defendant acts only through its officers and employees. We do not believe that this brief notice of Parr's violent manner, brought only to the attention of the track

foreman, could be considered to be notice to the corporate defendant under those facts. The Restatement (Second) of Agency, §213, commend *d.* at 459-460, sttes that an employee must have some antecedent reason to believe that the employee presents an undue risk of harm to others because of his vicious nature.

Both plaintiff and Gartner testified that Parr had not caused any previous trouble nor had Parr and the plaintiff had any other conflicts. The incident on April 17 was an isolated, brief occurrence. It was uncontradicted that Gartner did not see Parr hit plaintiff in the tool shed. Thus, any notice defendant had of Parr's violent nature occurred as the events at the track took place. Although the witnesses did not give a specific timetable, the events at the track were characterized a occurring very quickly.

In addition to the briefness of the events, it was uncontradicted that Gartner did not see much of what occurred. He did not see Parr strike plaintiff in the tool shed. At the track he was turned away from plaintiff and Parr as he did his work. He did not see Parr grabbing and coming at plaintiff nor did he see plaintiff graze Parr's lip with the spike. Not until Parr raised the axe did Gartner see any trouble and Parr quickly dropped the axe at Gartner's request.

Although plaintiff claims Gartner did nothing to defuse the trouble between plaintiff and Parr, we are at a loss as to what Gartner could have done bearing in mind Gartner saw very little of a very brief occurrence. The one case that has considered the question of the duty of a supervisory employee in this situation has denied that a supervisory employee has a duty to anticipate and prevent the conduct of an employee, such as Parr, in this situation. *Atlantic Coast Line R. Co.* v. *Southwell* (1927), 275 U.S. 64, 72 L.Ed. 157, 48 S.Ct. 25.

Plaintiff relies on the decision in *Harrison* v. *Missouri Pacific R.R. Co.* (1963), 372 U.S. 248, 9 L.Ed.2d 711, 83 S.Ct. 690, In that case plaintiff was assaulted by a fellow employee whom he accused of stealing a ballast fork. A jury awarded damages to plaintiff but the Illinois circuit court granted the railroad's motion for judgment notwithstanding the verdict. The appellate court affirmed, holding there was insufficient evidence that the railroad knew or should have known of the assailant's violent nature prior to the assault. (*Harrison* v. *Missouri Pac. R.R. Co.* (4th Dist. 1962), 35 Ill.App.2d 66, 181 N.E.2d 737.) In a per curiam opinion, the United States Supreme Court found the evidence sufficient to sustain the jury verdict and reversed. The testimony established that when the assailant was assigned to plaintiff's crew, the roadmaster warned plaintiff about assailant, calling him a bad actor and a troublemaker. Plaintiff testified that he complained to the roadmaster several times about his assailant's misconduct prior to the assault. After plaintiff reported the assault, the roadmaster again said I told you to watch out for him. The Supreme Court noted that the testimony was contradicted but that if believed by the jury it was sufficient evidence to support the railroad's notice of assailant's violent propensities.

We find the evidence of notice in *Harrison* quite different from the facts here. In *Harrison* the railroad's notice arose because plaintiff complained about the assailant several times and because the roadmaster knew of the assailant's vicious nature. Neither of those factors were present here.

Finding no negligence on the part of the defendant railroad, the trial court erred in denying defendant's motions for directed verdict and judgment notwithstanding the verdict. Accordingly, the judgment of the circuit court of Madison County is reversed.

REVERSED.

Jones and Welch, JJ., concur.

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

February 1, 1983

Mr. Del A. Goldenhersh
Attorney at Law
6464 W. Main St.
Belleville, IL. 62223

No. 57673 - Rodney Steven Biggs, petitioner, vs. Terminal Railroad Association of St. Louis, etc., respondent. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today *DENIED* the petition for leave to appeal filed in the above entitled cause. Goldenhersh, J. took no part.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

Office - Supreme Court
FILED
MAY 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1750

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RODNEY STEVEN BIGGS,
Plaintiff-Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a corporation,
Defendant-Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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vs.

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a corporation,
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case arises out of an injury plaintiff, Rodney Biggs, sustained during a fight with a co-employee, Robert Parr, on April 17, 1979. Plaintiff filed this suit under the Federal Employers Liability Act (FELA), 45 USC §51 *et.seq.*, against defendant, Terminal Railroad Association of St. Louis[1] on May 1, 1979.

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[1]Terminal Railroad Association of St. Louis is a corporation whose stock is owned by Southern Railway Company, Missouri Pacific Railroad Company, Seaboard System, Norfolk & Western Railway Company, Illinois Central Gulf Railroad Company, Burlington Northern Railroad Company, St. Louis & Southwestern Railway Company, Missouri, Kansas & Texas Railroad Company, and Chessie System Railroads.

On April 17, 1979, both plaintiff and Parr had been employed by defendant for approximately fifteen days. (R.161). Prior to April 17, 1979, neither had been involved in any fights or arguments of any kind and both had gotten along well together. (R.161).

On the morning of April 17, 1979, plaintiff, Parr, Ron Gartner, and other workers assembled in a shanty located in defendant's railroad yards. (R.162) Ron Gartner was the assistant track foreman. Everyone then walked to a nearby tool shed to get the tools they needed for their work. (R.33). While in the tool shed plaintiff asked Gartner, "Can I whip him?" (R.163). Gartner said no, directed the workers to begin their work, and then left the tool shed. (R.163). At this point, Gartner had no reason to believe Parr was serious. (R.163). Gartner testified that kidding and teasing is common among defendant's employees. (R.163).

Plaintiff claimed that after Gartner left the tool shed, Parr struck him on the jaw with with his fist. (R.39). Plaintiff did not introduce any evidence that anyone witnessed this occurrence.

Plaintiff then left the tool shed and began working on the tracks at the job of pulling spikes. (R.40). The fight between plaintiff and Parr, in which plaintiff was injured, occurred near the tracks. Plaintiff struck the first blow of the fight when he hit Parr in the mouth with a railroad spike. (R.59-60, 72-73, 165-66 & 179).

Gartner was not facing plaintiff and Parr when plaintiff hit Parr, but turned when he heard plaintiff strike the blow with the railroad spike. (R.165-66). Gartner then ordered both men to stop their fighting. (R.166). In the meantime, a fellow employee had restrained plaintiff. (R.72). Parr reacted to the blow from plaintiff by threatening plaintiff with a pick axe but Gartner ordered him to drop the pick axe and return to work. (R.73, 166, 175 & 179). Parr was also restrained by co-workers. (R.179). Parr dropped the pick axe and Gartner turned towards

plaintiff who had turned his back on Parr. Parr then picked up a railroad spike and reached over Gartner's shoulder and hit plaintiff in the back of the head with the spike. (R.42 & 74). The injury plaintiff sustained as a result of this blow to the back of the head is the basis of this lawsuit.

A jury returned a verdict in favor of plaintiff. The Appellate Court of Illinois for the Fifth District reversed the judgment on the verdict. Plaintiff sought leave to appeal to the Illinois Supreme Court but his petition was denied. Plaintiff is now seeking review of the appellate court's decision by way of a writ of certiorari.

SUMMARY OF REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

The appellate court's decision does not conflict with this Court's FELA decisions because defendant did not have prior notice of Parr's alleged vicious character.

REASONS FOR DENYING THE PETITION FOR FOR WRIT OF CERTIORARI

Plaintiff's petition for a writ of certiorari does not set forth any valid reasons why the United States Supreme Court should review this case on a writ of certiorari.

The appellate court's decision does not conflict with this Court's FELA decisions. This Court has held that a railroad has no duty to anticipate and prevent an attack on an employee by a fellow employee unless the railroad knows that the assailant has a vicious character. *Atlantic C. L. RR. Co.* v. *Southwell,* 275 U.S.64, 72 (1927). The appellate court's decision does not conflict with this principle because the appellate court correctly concluded that defendant did not have prior notice of Parr's alleged vicious character. *Biggs* v. *Terminal RR. Ass'n St.L.*, 110 Ill. App. 2d 709, 442 N.E.2d 1353, 1355 (1982). Since defendant did not have prior notice of Parr's alleged vicious character, defendant was entitled a directed verdict. Plaintiff claims that the events which occurred immediately before the fight in which he was injured constituted prior notice to defendant. The Appellate court properly held, however, that Parr's alleged vicious character brought only to the attention of an assistant track foreman during the fight, was not prior notice to defendant.

Plaintiff's claim that the standard from *Pedrick* v. *Peoria & Eastern RR. Co.*, 37 Ill.2d 494, 229 N.E.2d 504 (1967) was improperly applied by the appellate court is irrelevant because, under any standard, defendant did not have prior notice and was entitled to a directed verdict.

Plaintiff suggests for the first time that it was not necessary to prove that defendant had prior notice of Parr's alleged vicious character because the assistant track foreman was present during the fight. Plaintiff may not raise on appeal a new theory of liability which was not presented in the trial court. *Miller* v. *Avirom,* 384 F.2d 319, 321-23 (D.C. Cir. 1967). Further, there is no legal basis for this theory.

Plaintiff also suggests that defendant was negligent because the assistant track foreman did not intervene between the combatants. In plaintiff's appellate court brief, however, he conceded that Gartner did not have a duty to step between the combatants. Brief of Plaintiff-Appellee at 20. This contention also has no basis in law.

CONCLUSION

For the reasons stated above, defendant prays that plaintiff's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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